IN THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

Criminal Appeal Misc.No. 12 of 2012
(High Court Criminal Case No: HAC 177 of 2007)

BETWEEN	:	**INOKE BALEMILA DEVO**
		Appellant
AND	:	**FIJI INDEPENDANT COMMISSION AGAINST CORRUPTION**
		Respondent
Coram	:	**Calanchini P** **Basnayake JA** **Lecamwasam JA**
Counsel	:	**Mr. A.K. Singh for the Appellant** **Ms. F. Puleiwai for the Respondent**
Date of Hearing	:	**3 February 2017**
Date of Judgment	:	**23 February 2017**

JUDGMENT

Calanchini P

[1] I agree that the appeal should be dismissed. I venture to add some comments on the issue of arbitrary act. It may well be, as Counsel for the Appellant submitted, that departments do use government vehicles and drivers to collect provisions for departmental functions. Such provisions would include refreshments and supermarket purchases. Whether liquor is included on such occasions would depend upon prior approval for the consumption of liquor on the premises.

[2] However the evidence before the Court was sufficient to bring the Appellant's conduct within the parameters of an arbitrary act for the purposes of the offence of abuse of office. First, his position as Commissioner Central must be considered in the context of his role in the liquor licencing regime. Secondly, the evidence indicated that the liquor was not just for consumption at departmental functions. Thirdly, it would appear that the liquor acquired by the use of government vehicles and drivers was not paid for but was described as having been "*donated.*"

[3] I have no doubt that the combined effect of the evidence was capable of satisfying the learned Judge that the Appellant had committed arbitrary acts and that guilt had been established beyond reasonable doubt.

Basnayake JA

[4] The appellant was charged with five counts of official corruption under section 106 (a) and four counts of abuse of office under section 111 of the Penal Code (now repealed). After trial he was acquitted on all counts of official corruption. He was convicted on three counts of abuse of office (on 6 April 2010) and was sentenced to 9 months imprisonment on each count. The sentences were to run concurrently. Having served the sentence, he appealed against the conviction nearly two years after.

[5] On 28 July 2015 the Hon. President of the Court of Appeal has granted leave (pgs. 44-51 of Vol. 1 of the Record of the High Court (RHC)) limiting the appeal to the first three grounds in the draft notice to wit;

i. Referring this matter to the assessors for determination when under all the circumstances of the case it was unsafe or unsatisfactory to do so;

ii. In not adequately directing/misdirecting the assessors on the law relating to abuse of office;

iii. In not directing/misdirecting the assessors that the prosecution evidence before the court demonstrated that there were serious doubts in the prosecution case and such benefit of doubt ought to have been given to the appellant.

Submissions of the learned counsel for the appellant as to the grounds were that rules and regulations and the terms of the contract breached were not incorporated into the charges and were not adduced in evidence

[6] The learned counsel for the appellant and the respondent have already filed written submissions in support of their arguments. However at the hearing the learned counsel for the appellant narrowed down the area of submissions to the following ground, namely; that the prosecution has failed to specify the particulars of the offence in the charge itself. The learned counsel also submitted that the prosecution did not lead any evidence with regard to the Financial Rules and Regulations referred to by the learned Judge in paragraph 16 of the summing up. Further submissions were made that the prosecution has failed to adduce evidence with regard to the terms and conditions of the contract of employment and the terms breached.

[7] The learned counsel conceded that the learned Judge had correctly dealt with the elements of abuse of office which the State required proved. The appellant was convicted on the premise that he acted arbitrarily and directed that the official vehicle GM 472 be used to collect liquor for unofficial purposes during the material times in 2005 and 2006. The arbitrary act is explained by the learned Judge in the summing-up in paragraph 16 with an example which is as follows;

> *"The second element is that the accused did an arbitrary act. In law, an arbitrary act is an unreasonable act, a despotic act, act which is not guided by rules and regulations but by the wishes of the accused. Let me give you*

an example. In a government, the accounts officers are supposed to follow financial rules and regulations when it comes to raising payments on behalf of the government. If one accounts officer decided to ignore the financial rules and regulations when raising payments, that would be an arbitrary act. That is because the act is guided by the wishes of the accounts officer and not by proper financial regulations" (pg. 137 of RHC).

[8] The learned counsel for the appellant while approving the example of the leaned Judge submitted that no such financial rules and regulations were led in evidence which has resulted in a failure to prove the arbitrary act. The learned counsel further submitted (Para. 13 at pg. 23 of the RHC) that the charge has failed to state which particular provision of government rules or regulations were breached by the appellant. While denying that the appellant committed any arbitrary act, the learned counsel submitted that the evidence adduced clearly demonstrated that the arbitrary acts were performed by Alumita Raceva (as per para. 54, 57 and 59 of the summing-up). The learned counsel submitted that there is no evidence led at the trial that it was the appellant who directed the driver to collect liquor from various liquor outlets.

[9] The learned counsel submitted that authorising the use of an official vehicle is not an element of the abuse of office under section 111 of the Penal Code. The argument of the learned counsel is succinctly stated in paragraphs 27 (pg. 28 of RHC), 32, 34 a, b & d (pg.29) and 44 (pg. 34) of the written submissions of the appellant. The learned counsel in his submissions does not challenge the evidence adduced in this case or the admissions made by the appellant at the caution interview. He essentially confines his argument to a pure question of law, namely, whether the appellant had been adequately informed of the charges on which he was convicted and whether any evidence had been adduced on the Rules and regulations and the terms of contract of the appellant.

[10] I would like to consider the several points taken separately under three headings;

A. Failure to specify the particulars of the offences in the charges;

B. Failure to lead evidence on the financial rules and regulations;

C. Failure to adduce evidence on the terms of contract of employment.

A. Failure to specify the particulars of the offence in the charges

[11] Section 58 of the Criminal Procedure Decree Cap 21 specifies the information that a charge should contain. The section is as follows:

> *Every charge ...shall contain-*
>
> *(a) a statement of the specific offence ...with which the accused person is charged; and*
>
> *(b) Such particulars as are necessary for giving reasonable information as to the nature of the offence charged.*

[12] Lord Ackner in **R.v Savage; DPP v Parmenter** [1992] 1 A.C. 699 at 737 H.L. (Archibald 2015 Edition Pg 73 para 1-190) held that "if an accused considers that he is entitled to further particulars of the offence with which he is charged he can seek those from the prosecution and if unreasonably refused, he can obtain an order from the court". However in the case that is on appeal at no time did the appellant or the counsel seek any further information with regard to the charges contained in the amended information (pgs. 501 to 505 of RHC). The appellant never complained about the information furnished being insufficient. This complaint was made for the first time while making his submissions at the hearing of this appeal.

The counts

[13] The appellant was convicted on counts Nos. 3, 7 and 9. They are as follows:

> Count No. 3; *Abuse of office: Contrary to section 111 of the Penal Code Cap 17. Particulars of the offence: Inoke Devo between the 1st day and 31st day of March 2006 at Suva in the Central Division being employed as the Commissioner Central and charged with the duties of election preparations, authorised the unlawful expenditure of public funds by sending out his staff members in government vehicles to collect liquor and alcoholic beverages from various liquor outlets within the Central*

Division which is an arbitrary act in the abuse of the authority of his office and prejudicial to the rights of the State.

Count No. 7; *Inoke Devo on the 2nd day of December 2005 at Suva in the Central Division being employed as the Commissioner Central and charged with the general duties as Commissioner Central, authorised the unlawful expenditure of public funds by sending out his staff members in government vehicles to collect liquor and alcoholic beverages from various liquor outlets within the Central Division for their office Christmas party, which was an arbitrary act in the abuse of the authority of his office and prejudicial to the rights of the State.*

Count No. 9: *Section 111. Inoke Devo between 1st and 31st December 2006 at Suva in the Central Division being employed as Commissioner Central and charged with the general duties as Commissioner Central, authorised the unlawful expenditure of public funds by sending out his staff members in government vehicles to collect liquor and alcoholic beverages from various liquor outlets within the Central Division for their office Christmas party, which was an arbitrary act in abuse of the authority of his office and prejudicial to the rights of the State.*

[14] The appellant was convicted on the premise that he acted arbitrarily and in abuse of his office by directing the staff and using the official vehicle GM 472 to collect liquor for unofficial purposes during the material times in 2005 and 2006.

[15] For the purpose of considering whether the information given in the charges was adequate or not, it becomes necessary to scrutinize the section under which the appellant had been charged. The offence of abuse of authority under section 111 is as follows:

Any person who being employed in the public service, does or directs to be done in abuse of authority of his office, any arbitrary act prejudicial to the rights of another, is guilty of misdemeanour. If the act is done or directed to be done for purpose of gain, he is guilty of a felony, and is liable to imprisonment for three years.

[16] The learned Judge in paragraphs 15 to 18 (pgs 137 to 138 of RHC) of the summing up has explained what the prosecution needs to prove.

[17] The main elements that require proof under section 111 of the Penal Code have been exhaustively dealt with by the Court of Appeal of Fiji in **Laisenia Qarase v Fiji Independent Commission Against Corruption** (Criminal Appeal AAU 66 of 2012 (30 May 2013)). The main elements have been categorised in to 5 as follows:

1. That the accused was employed in the public service;
2. That he did an arbitrary act;
3. The act was in abuse of authority of his office;
4. The act was prejudicial to the rights of another.
5. It constitutes a felony where the act was done for the purpose of gain.

[18] In the case under review the appellant did not dispute the first element above, namely, the fact that the appellant was in the public service during the relevant period. The learned High Court Judge has found the appellant guilty of committing a misdemeanour and not a felony. Therefore the fifth element, namely, whether the commission of the act was for the purpose of gain too need not be considered.

Arbitrary act

[19] In **Tomasi Kubunavanua v The State** (Criminal Appeal No. AAU0008 of 1992 (5 May 1993)) a police officer was charged under section 111 for removing a screen and a video deck, productions in a pending case, from the exhibit room of the police station. "Arbitrary act" has been interpreted by court as nothing more than the exercise of one's own free will.

[20] The Court of Appeal (**Qarase's** (supra)) also considered favourably the following statements as interpreting "arbitrary act". "An autocratic act, an act not guided by normal procedures but by "whims and fancies" of the accused"; Jesuratnam J in **State v Humphrey Kamsoon Chang** (HAC 0008 of 1991 (1 Nov 1991)). An arbitrary act was said to include an unreasonable act, a despotic act which is not guided by rules and

regulations but by the whims of the accused (**The State v Rokovunisei** (HAC 37 of 2010 (26 April 2012)).

[21] The learned Judge in paragraph 16 of his summing up (pg 137 RHC) described the element of arbitrary act as "an unreasonable act, a despotic act, an act which is not guided by rules and regulations but by the wishes of the accused".

Act was in abuse of authority of office

[22] The Supreme Court in **Naiveli v The State** (CAV 001 of 1994 (20 Nov 1995)) while explaining abuse of authority held, "Central to the commission of an offence under section 111 is the doing or directing to be done of an arbitrary act, "in abuse of the authority of" the accused "office". What differentiates something done in abuse of office from something not done in abuse of office in many cases will be the state of mind of the accused. An act done or direction given, which is otherwise within the power of authority of an officer of the public service, will constitute an abuse of office, if it is done or given maliciously with the intention of causing loss or harm to another or with the intention of conferring some advantage or benefit on the officer" (emphasis added).

[23] "The act complained of should be done under colour of his office. This would mean that the act complained of should be done under colour of his office where use is made of such office by the accused" (**Qarase)** (supra). The learned High Court Judge while describing the abuse of authority stated in paragraph 17 of the summing-up, "When someone uses his position for some illegitimate agenda, some reason which is not proper according to institutional procedure, he acts in bad faith, for an improper motive to harm someone or show someone an advantage or favour....To decide what is an abuse of office you need to consider what motivated the accused to act in the way he did. If he had some improper motive or acted in bad faith and used his position to achieve that motive, then this element is proven. In order to understand what the accused had in his mind, you need to look at all the evidence and draw your own conclusions about his motives. His motives may lead you to decide whether he acted in abuse of office or not".

Prejudicial to the rights of another person

[24] This has been described by the Supreme Court of Fiji as an act, which would result in some advantage or favour to oneself, friends, relations, individuals or corporate (**Patel v FICAC** (CAV 0007 of 2011 (26 August 2013) and **Qarase** (supra)). The learned High Court Judge states that when a person is prejudiced, his interests are put at a disadvantage (para 18 of the summing-up at pg. 138 of RHC). In this case it is the rights of the State that are in jeopardy.

[25] The charges while specifying the offence under which the appellant was charged with namely, section 111, described the offence with dates that they were committed, the places they were committed in and the acts done. The persons used in the commission of the crime were the staff employed by the State and the property involved was a government vehicle, namely, the official vehicle and the official driver of the appellant. The acts done were the collection of liquor and alcohol beverages from liquor outlets of the Division of which the appellant has authority and control.

[26] The learned counsel for the appellant has conceded in the written submissions tendered to court that the learned Judge has correctly dealt with the issue relating to abuse of office in the summing up. The learned counsel for the appellant did not contest the facts of this case. The prosecution case rests on the admissions the appellant has made at the caution interview, together with the oral and documentary evidence produced in this case.

[27] The learned counsel for the appellant takes one further step in conceding by accident the guilt of the appellant in the written submissions tendered to court dated 23 September 2015 in paragraph 50 while stating, "*In the Fijian civil service, it has always been custom and practice for department heads to receive food and alcohol for Christmas functions and often such gifts are collected by the government vehicles as the gifts are intended for consumption at the official Christmas party and for which there is a time and date allocated to each government ministry and department*" (pgs 35 and 36 RHC).

[28] The learned judge in his judgment has found that the evidence relating to counts 3, 7 and 9 is overwhelming. The 3rd count relates to the period 1 March 2006 and 31 March 2006. The 7th count relates to 2nd December 2005. The 9th count relates to the period 1 December 2006 and 31 December 2006. All these counts are concerning the collection of liquor and alcoholic beverages from various liquor outlets. The appellant was the Commissioner Central during the period involving the charges. It was the office of the Commissioner Central that processed liquor licences. Although approval was required of the Liquor Tribunal, the appellant had control over the issue of liquor licences, being a member of the Tribunal. Liquor licences were ultimately authorised by the appellant by placing his signature to the licences. There is ample evidence relating to requests made to have the liquor available for collection. The requests were made by the appellant personally and by the staff.

[29] Counts 1, 2, 4, 5 and 6 relate to official corruption. Of these charges counts 2, 5 and 6 are concerning soliciting alcoholic beverages from different persons on account of issuing licences. The appellant was discharged and acquitted on all those charges for the reason that the prosecution was not able to prove beyond reasonable doubt the nexus between the receipt of goods and the issuing of licences. However evidence relating to employing the staff and the use of the official vehicle is found to be ample.

[30] The learned counsel for the appellant reluctantly concedes that he is not disputing the evidence led in this case. The submission of the learned counsel is confined to the failure on the part of the prosecution to prove the Rules and Regulations and the terms of contract that the appellant is alleged to have breached apart from the fact that counts 3, 7 and 9 on which the appellant was convicted did not give adequate details relating to those charges. Counts 1, 2, 5 and 6 on which the appellant was acquitted carried a detailed account of the accusation. However, the counts on which he was convicted did not contain any particulars with regard to the persons from whom liquor and alcoholic beverages were collected.

[31] The learned counsel for the appellant submitted that counts 3, 7 and 9 do not contain facts as stated in counts 1, 2, 5 and 6 of which the appellant was acquitted. I have already mentioned what is needed to be proved under section 111 under which counts 3, 7 and 9 are based. In terms of section 111, what is required to be proved is an arbitrary act done in abuse of the office. The arbitrary act done in this case was to employ staff and the use of government vehicle or vehicles to collect alcohol from various outlets. The names of the staff, the vehicle employed and the places from which the alcohol was collected have been led in evidence. These acts were committed by the appellant while holding the office of the Commissioner Central who was the liquor licensing authority.

[32] I am of the view that the learned counsel is misconceived as to the requirements of section 111. Counts 1, 2, 4, 5 and 6 where the appellant had been acquitted are based on section 106 (a) of the Penal Code which deals with official corruption. Section 106 (a) is as follows:

> *"Any person who-(a) Being employed in the public service, and being charged with the performance of any duty by virtue of such employment, corruptly asks for, solicits, receives or obtains or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, by him, in the discharge of the duties of his office; or (b) (Not reproduced as being not relevant) is guilty of a felony and is liable to imprisonment for seven years.*

[33] This section requires the prosecution to give notice to the accused about anything he has solicited and or received and on what account the soliciting was done or acceptance made. This may be the reason why the charges carried details of the accusation. However the ingredients of section 111 are different. What the section needs proved has already been mentioned. The counts based under this section, namely, counts 3, 7 and 9 specify the accusation as required by section 111. That is the employment of staff and vehicles to collect liquor from various outlets in the Division where the appellant has authority. The names of the staff, the registration numbers of the vehicles, the liquor received and the persons from whom it was received formed part of the evidence.

[34] The purpose of producing the particulars of the offence is to indicate to the person accused of the offence the nature of the case the State intends to present. It does not need to set out the whole evidence and it is sufficient if it indicates how the case will be presented. There is no need to produce government regulations or terms of the contract of employment to prove the charges. What is required is to prove an arbitrary act which was in abuse of authority which prejudiced the rights of another.

B. Failure to lead evidence on financial rules and regulations

[35] The appellant was convicted under section 111 of the Penal Code. I have already dealt with the elements of section 111. The learned counsel for the respondent submitted that the prosecution does not necessarily need to adduce any governmental rules and regulations which the appellant allegedly breached. The learned counsel submitted that the appellant while enjoying all the powers to grant liquor licences, used that authority to obtain liquor from the outlets within his jurisdiction.

[36] The learned counsel for the respondent submitted that the learned High Court Judge in paragraph 16 of the summing-up mentioned rules and regulations only as an example. It does not mean that the learned Judge imposed a condition on the prosecution to prove the rules and regulations. What the prosecution is required to prove is set out in the law. That is section 111 of the Penal Code.

Striking Feature

[37] A striking feature of this case is the conduct of the appellant. The appellant while denying that he performed arbitrary acts accused Alumita Raceva of doing so (evidence is at pgs. 560 to 566 of RHC and the summary in the summing-up at paragraphs 58 to 62 pgs.147 /8 RHC). Alumita worked in the Office of the appellant. She worked in the committee that organised the Christmas party. She states that it was the appellant who instructed her to collect liquor from the liquor outlets. On the instructions of the appellant, Alumita had

called the liquor outlets for liquor and sent the staff to collect them. Alumita had to organise a cocktail party during the elections in 2006. This was done at the instance of the appellant. She arranged for the collection of liquor from nightclubs. She was also instructed to get assistance from the staff in the collections. The argument of the appellant is that the arbitrary acts were done not by the appellant but by Alumita. Her evidence went unchallenged.

[38] Jadgish Chand was the official driver of the appellant. He drove the vehicle GM 472. Apart from that a large number of witnesses from the staff and from the liquor outlets gave evidence corroborating Alumita. The appellant admitted in his cautioned interview to having abused the authority of his office. I do not intend on exploring into this arena as there is no debate. The elements of the offence mentioned above have been established beyond reasonable doubt.

C. Failure to adduce evidence on the terms of contract of employment

[39] Another matter that needs to be mentioned is about not producing the terms of contract of employment of the appellant. Again I have to reiterate the counts for which the appellant was convicted. At the outset the appellant admitted to being a holder of public office. That absolved the prosecution from proving that element.

[40] I am of the view that the prosecution has proved beyond reasonable doubt what is required by section 111 of the Penal Code. Considering the foregoing reasons I am of the view that this appeal lacks merit. Hence the appeal is dismissed.

Lecamwasam JA

[41] I agree with the judgment of Basnayake JA.

The Order of the Court:

Appeal is dismissed.

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Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL